

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ARCHER-DANIELS-MIDLAND
COMPANY, and

MINNESOTA CORN PROCESSORS, LLC,

Defendants.

CASE NUMBER: 1:02CV01768

JUDGE: John D. Bates

DECK TYPE: Antitrust

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 5(b) of the Clayton Act, as amended by Section 2 of the Antitrust Procedures and Penalties Act (codified at 15 U.S.C. §§ 16(b)-(h) (“Tunney Act”)), the United States files this Competitive Impact Statement relating to the Proposed Final Judgment submitted for entry in this civil antitrust proceeding.

1. NATURE AND PURPOSE OF THE PROCEEDING

On September 6, 2002, the United States of America filed a civil antitrust Complaint alleging that the proposed acquisition by Archer-Daniels-Midland Company (“ADM”) of Minnesota Corn Processors, LLC (“MCP”) would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that ADM and MCP are two of the largest corn wet millers in the United States and compete in the manufacture and sale of corn syrup and high fructose corn syrup (“HFCS”) in the United States and Canada. The Complaint further alleges that through its acquisition of MCP, ADM will eliminate this competition and increase concentration in the already highly concentrated corn syrup and HFCS markets, making

anticompetitive coordination among the few remaining competitors more likely. The request for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; (2) a permanent injunction preventing consummation of the merger agreement; (3) an award of costs to the plaintiff; and (4) such other relief as the Court may deem just and proper.

When the Complaint was filed, the United States also filed a proposed Final Judgment that would permit ADM's acquisition of MCP, but would preserve competition by requiring, *inter alia*, the defendants to dissolve the marketing and sales joint venture that MCP formed with another corn wet miller, Corn Products International ("CPI").¹ The defendants are required to provide written notice to CPI of their election to dissolve the joint venture no later than consummation of ADM's acquisition of MCP and to complete the dissolution of the joint venture no later than December 31, 2002. On the same day the defendants give written notice to CPI, the proposed Final Judgment also provides that the defendants are prohibited from selling, marketing, or pricing any products in cooperation or coordination with the joint venture or CPI, and they must notify CPI that it is relieved of all obligations under the joint venture that would prevent it from competing fully with the defendants. The proposed Final Judgment does not affect or alter any obligations of ADM and MCP to perform existing contracts or commitments to its customers.

The United States and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the Tunney Act. Entry of the proposed Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify,

¹The defendants entered into a Stipulation (filed contemporaneously with the Final Judgment) in which they agreed to be bound by the proposed Final Judgment pending final determination of this matter by the Court.

or enforce provisions of the proposed Final Judgment and to punish violations thereof.

2. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

a. The Defendants and the Proposed Transaction

ADM is a Delaware corporation, with its principal offices located in Decatur, Illinois. ADM is engaged in the processing and sale of agricultural products, including corn syrup and HFCS, which are among the products it produces from corn through the wet milling process at domestic plants in Cedar Rapids, Iowa, Clinton, Iowa, and Decatur, Illinois. Its net sales in 2001 were approximately \$20 billion. Its sales of corn wet milled products in the United States in 2001 exceeded \$1 billion, including HFCS sales of approximately \$480 million and corn syrup sales of approximately \$66 million.

MCP is a Colorado limited liability company, with its principal offices in Marshall, Minnesota. MCP is an agricultural processing and marketing business that operates corn wet milling facilities in Marshall, Minnesota and Columbus, Nebraska. MCP's net sales in 2001 were approximately \$620 million. MCP's 2001 sales of corn wet milled products in the United States totaled approximately \$402 million, with HFCS sales of approximately \$153 million and corn syrup sales of approximately \$56 million.

MCP sells its corn wet milled products through a joint venture that it formed in December 2000 with CPI. The joint venture, known as CornProductsMCP Sweeteners LLC ("CPMCP"), is the exclusive outlet for MCP's and CPI's corn syrup and HFCS products.

On July 11, 2002, ADM and MCP entered into an agreement under which ADM would acquire MCP. This transaction, which would increase concentration in the already highly concentrated corn syrup and HFCS markets, precipitated the government's suit.

b. Corn Syrup and High Fructose Corn Syrup Markets

Corn syrup and HFCS are manufactured by wet mill processing of corn. In the wet milling process, corn kernels are first soaked in water, then ground and separated from other components of the kernel, producing a starch slurry. To manufacture corn syrup and HFCS, the corn wet millers add enzymes and/or acid that convert the starch slurry to sugars, such as dextrose and fructose.

Corn syrup is used as a sweetener in the preparation of assorted food products, including confectionary, bakery, and dairy products, salad dressing, condiments, jams, and jellies, lunch meats, canned food, and vegetables. Specific applications require different grades of corn syrup with different sweetening effect. The corn wet millers that manufacture corn syrup can and do make most or all the various grades of corn syrup.

There are two grades of HFCS -- HFCS 42 and HFCS 55 -- with the numbers referring to the percentage of fructose in the product. HFCS 42 is used as a sweetener in jam, jellies, baked goods, canned food, dairy products, and some beverages. HFCS 55 is used mainly in the soft-drink industry as a substitute for sugar.

There are no realistic substitutes for corn syrup or HFCS to which customers could switch in the event of a small, but significant and non-transitory price increase. Corn syrup in its various grades, HFCS 42, and HFCS 55 are each distinct products without practical substitutes, differing from all other sweeteners and one another in their physical characteristics, means of production, many uses, and pricing. Although sugar is functionally interchangeable with corn syrup, HFCS 42 and HFCS 55 in many applications, it is significantly more expensive.

c. Harm to Competition as a Consequence of the Acquisition

The markets in the United States and Canada for corn syrup, HFCS 42 and HFCS 55 are already highly concentrated. ADM competes against only four other firms in the manufacture

and sale of corn syrup, HFCS 42 and HFCS 55 in the United States or Canada. In these markets, ADM accounts for about 10% of all corn syrup manufacturing capacity, 33% of all HFCS 42 manufacturing capacity, and 25% of all HFCS 55 manufacturing capacity. MCP, in its joint venture with CPI, accounts for more than 20% of all corn syrup manufacturing capacity, more than 15% of all HFCS 42 manufacturing capacity, and more than 15% of all HFCS 55 manufacturing capacity.

If ADM acquires MCP and succeeds to MCP's position in its joint venture with CPI, the markets in the United States and Canada for corn syrup, HFCS 42 and HFCS 55 will become substantially more concentrated. The number of independent competitors will be reduced from five to four, increasing the likelihood of anticompetitive coordination among the few remaining corn wet millers that manufacture and sell corn syrup and HFCS 42 and HFCS 55.

Entry by a new competitor would not be timely or likely to prevent this harm to competition. Successful entry into the manufacture and sale of corn syrup, HFCS 42 and HFCS 55 is difficult, time consuming, and costly. Construction of an efficient corn wet milling facility likely would take more than two years from the time of site selection to production of commercial quantities of corn wet milled products.

As the Complaint alleges, the transaction would likely have the following effects, among others: actual competition between the defendants in the corn syrup and HFCS markets will be eliminated; competition generally in the manufacture and sale of corn syrup and HFCS throughout the United States and Canada will lessen substantially; the prices for corn syrup and HFCS will increase; and the amounts of corn syrup and HFCS produced will decrease.

3. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The provisions of the proposed Final Judgment are designed to eliminate the

anticompetitive effects resulting from ADM's acquisition of MCP and succession to MCP's interest in the joint venture with CPI and to preserve competition in the manufacture and sale of corn syrup and HFCS. The proposed Final Judgment contains three principal forms of relief. First, it requires the defendants to dissolve the joint venture by December 31, 2002. This relief is intended to ensure that the acquisition does not reduce the number of independent competitors in the corn syrup and HFCS markets in the United States and Canada. Prior to the acquisition, there were five competitors and with the dissolution of CPMCP, there will still be five. Second, the proposed Final Judgment also requires that, prior to or simultaneously with the closing of ADM's acquisition of MCP, the defendants must provide CPI written notice of their election to dissolve CPMCP. Upon written notice of their election to dissolve CPMCP, the defendants are additionally required to provide CPI written notice that CPI is permitted to conduct independent operations in competition with the defendants and CPMCP. This relief is intended to ensure that, prior to accomplishment of the dissolution of CPMCP, CPI is permitted to independently market and sell corn syrup and HFCS. Third, the proposed Final Judgment further requires the defendants to compete independently of CPMCP and CPI. The proposed final Judgment does not affect or alter any obligations of ADM and MCP to facilitate or ensure that CPMCP completes the performance of any existing contracts or commitments to its customers.

Thus, the decree will ensure that there are at least five independent competitors in the corn syrup and HFCS markets, and will preserve and encourage ongoing competition between ADM and CPI.

4. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in a federal court to

recover three times the damages the person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against defendants.

5. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the Tunney Act, provided that the United States has not withdrawn its consent. The Tunney Act conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The Tunney Act provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Roger W. Fones
Chief, Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
325 Seventh Street, NW, Suite 500
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

6. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the defendants. The United States is satisfied, however, that the dissolution of the joint venture and other relief contained in the proposed Final Judgment will preserve competition in the production and sale of corn syrup and HFCS and that the proposed Final Judgment would achieve all of the relief that the government would have obtained through litigation, but avoids the time and expense of trial. The United States is satisfied that the proposed relief will prevent the acquisition from having anticompetitive effects in this market. The dissolution of the joint venture will preserve the existence of five independent competitors, thus eliminating the likelihood that the acquisition would have facilitated industry coordination.

7. STANDARD OF REVIEW UNDER THE TUNNEY ACT FOR PROPOSED FINAL JUDGMENT

The Tunney Act requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment “is in the public interest.” In making that determination, the Court *may* consider --

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the Court of Appeals for the District of Columbia Circuit has held, the Tunney Act permits the Court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government’s complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft*, 56 F. 3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, “the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.”² Rather,

absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508 at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not “engage in an unrestricted evaluation of what relief would best serve the public.” *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988), *quoting United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *see also Microsoft*, 56 F. 3d

²119 Cong. Rec. 24598 (1973); *see also United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A “public interest” determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the Tunney Act. Although the Tunney Act authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See H.R. 93-1463*, 93d Cong. 2d Sess. 8-9, *reprinted in* (1974) U.S.C.C.A.N. 6535, 6538.

1448 (D.C. Cir. 1995). Precedent requires that

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (citations omitted) (emphasis added).³

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), *quoting Gillette*, 406 F. Supp. at 716.⁴

Moreover, the Court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and the Act does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Mircosoft*, 56 F.3d at 1459. Since "[t]he court's authority to review the

³See also *United States v. BNS, Inc.*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *Gillette*, 406 F. Supp. at 716; *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983).

⁴See also *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that the court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have, but did not, pursue. *Id.* at 1459-60.

8. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the Tunney Act that were considered by the United States in formulating the proposed Final Judgment.

Dated: September 13, 2002

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF
AMERICA:

"/s/"

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2002, I have caused a copy of the foregoing United States's Competitive Impact Statement to be served by first class mail, postage prepaid, and by facsimile on counsel for defendants in this matter:

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